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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

JAMES ELLENBECKER, in his capacity of Secretary of the South Dakota Department of Social Services, TERRY WALTER, in his capacity as Program Administrator, South Dakota Office of Child Support Enforcement,
Petitioners,

v.

VELDA HOWE, THERESA TAKEN ALIVE, on behalf of themselves, their children, and all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER TITLE IV-D OF THE SOCIAL SECURITY ACT [42 U.S.C. § 651 et. seq.] CONFERS STANDING AND CREATES PRIVATE ENFORCEABLE RIGHTS THEREBY ALLOWING INDIVIDUAL LITIGANTS TO COMMENCE AND MAINTAIN § 1983 CIVIL RIGHTS LAWSUITS AGAINST STATE AND FEDERAL OFFICIALS FOR ALLEGED VIOLATIONS OF THE ACT'S NUMEROUS STATUTORY AND REGULATORY PROVISIONS?

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Respondents.

Petitioners James Ellenbecker and Terry Walter respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on October 13, 1993.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is not yet published, but is printed in the Appendix at A-1 through A-23. The opinion and order of the district court appears at 774 F. Supp 1224 (D.S.D. 1991), and also appears in the Appendix at A-26 through A-75. A memorandum order issued by the district court on March 27, 1992, granting plaintiffs relief, appears in the Appendix at A-76 through A-86. A subsequent memorandum order issued by the district court on August 10, 1992, granting plaintiffs further relief, appears in the Appendix at A-87 through A-105.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on October 13, 1993. A-24 through A-25. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 651 et. seq. (1988) - Title IV-D of the Social Security Act [the Child Support and Establishment of Paternity Act] - Appendix at A-106 through A-269.

STATEMENT OF THE CASE

This case has national significance for each of the 54 participating states and territories which operate a Child Support and Establishment of Paternity program under Title IV-D of the Social Security Act. See, 42 U.S.C. § 651 et. seq. (1988). The sole issue presented is whether Title IV-D creates private enforceable rights thereby allowing private litigants such as Respondents herein to commence § 1983 civil rights lawsuits against state and federal officials for alleged violations of Title IV-D's numerous statutory and regulatory child support provisions. If upheld, the Eighth Circuit

Court of Appeals' decision will allow countless § 1983 lawsuits seeking private enforcement of Title IV-D, even though the 54 participating states and territories are in total and complete compliance with all statutory and regulatory requirements as established by Congress and the Federal Secretary.

1. Statutory Background

The State of South Dakota is a participant in the Federal Aid to Families with Dependent Children (AFDC) program established under Title IV-A of the Social Security Act. 42 U.S.C. § 601 et. seq. The AFDC program was created by the Social Security Act of 1935 to provide monetary payments to poor families deprived of support due to a parent's absence, death, or incapacity. 42 U.S.C. § 601 et. seq. States are not required to participate in the AFDC

program. Instead, participation is totally voluntary. Any state which chooses to participate in the AFDC program under Title IV-A must operate a program which meets any and all federal requirements and standards. One such requirement is that each state participating in the AFDC program under Title IV-A must also operate a separate child support enforcement program under Title IV-D of the Social Security Act. 42 U.S.C. § 651 et. seq. The sanction for failure to operate a child support enforcement program in compliance with all Title IV-D requirements is reduction or total elimination of federal IV-A (AFDC) payments.

As part of its child support enforcement responsibilities under Title IV-D, each participating state must provide parent locator services; establish child support obligations; enforce support obligations; and,

establish paternity, in accordance with numerous federal regulations and requirements. See, 42 U.S.C. § 654(4). A few of the Title IV-D requirements which each participating state must meet by way of appropriate laws, regulations, or procedures include, among other things, the establishment of paternity until the age of 18 [42 U.S.C. § 666(a)(5)(A)(i)]; the use of genetic testing in paternity cases [42 U.S.C. § 666(a)(5)(B)]; requiring absent parents to post bond or other security to insure prompt payment of support obligations [42 U.S.C. § 666(a)(6)]; imposing liens on real or personal property [42 U.S.C. § 666(a)(4)]; withholding child support arrearages from income tax returns [42 U.S.C. § 666(a)(3)]; reporting child support arrearages to credit reporting agencies [42 U.S.C. § 666(a)(7)]; establishment of uniform child support guidelines [45 C.F.R. § 302.56];

use of immediate income withholding to collect current and past-due support obligations [42 U.S.C. § 666(a)(8) & § 666(b)]; periodic review and modification of child support obligations [45 C.F.R. § 303.4(c)]; and, securing and enforcing medical support obligations [45 C.F.R. § 303.31].

Each participating state is also statutorily required to comply with any and all federal directives which the Secretary determines to be necessary in order to assure the effectiveness of the Title IV-D program. 42 U.S.C. § 652(a)(1); 42 U.S.C. § 654(14). All Title IV-D services complying with federal requirements must be provided to both AFDC and non-AFDC recipients alike. 42 U.S.C. § 654(6).

Each state is also required to submit for the Secretary's approval a state plan. Each state plan must meet all Title IV-D requirements and implementing regulations. A

state plan must also "provide for entering into cooperative arrangements with appropriate courts and law enforcement officials" to assist the state in meeting its obligations under Title IV-D. 42 U.S.C. § 654(7). Any such cooperative arrangements must "specify that the parties will comply with Title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements." 42 U.S.C. § 654.

The Secretary is responsible for reviewing and ultimately approving each state plan. Upon approval of its plan, a state is entitled to payment by the Secretary of a substantial portion of its costs in providing child support enforcement services under Title IV-D. 42 U.S.C. § 655. Disapproval of a state's plan may result in total termination of federal funding and federal financial participation. 45 C.F.R. § 301.13(d). Child

support enforcement services provided by states which do not meet Title IV-D requirements are not entitled to federal financial participation.

Title IV-D also contains a very comprehensive and complex internal remedial scheme which exists between each participating state and the federal government. In addition to continual review and approval of required state plans, the Secretary is also required to conduct extensive, triennial audits of each state's IV-D child support enforcement program. 45 C.F.R. § 305.10. The purpose of the audit is to insure that each participating state is operating its Title IV-D program in "substantial compliance" with all federal requirements. "Substantial compliance" is defined as providing required IV-D support enforcement services in at least 75% of audited cases. 45 C.F.R. § 305.20.

As part of the audit process, and to insure participating states are operating effective and efficient support enforcement programs which substantially comply with all federal requirements, the Secretary has established no less than 56 audit criteria. Each state must have written procedures for, and substantially comply with, each of these specified criteria. 45 C.F.R. § 305.20(a)(1); 45 C.F.R. § 305.20 (a)(2). If the Secretary determines that a state is not in substantial compliance with all federal requirements and audit criteria, the Secretary provides the state written notice of each unmet criteria. The Secretary also establishes the amount of the penalty, which penalty is mandatory once the conditions of the penalty statute are met. 42 U.S.C. § 603(h)(1).

Any penalty imposed by the Secretary for noncompliance may be suspended for a period

not to exceed one year so long as the state submits a corrective action plan within 60 days of the penalty notice. 45 C.F.R. § 305.99. A corrective action plan must be approved by the Secretary and must contain the steps necessary to achieve substantial compliance with all IV-D requirements. 42 U.S.C. § 603 (h)(2)(A)(i). Only one corrective action period is available for each of the 56 audit criteria. 42 U.S.C. § 603(h)(1). There is no administrative appeal of the Secretary's decision to disapprove a states' corrective action plan. 45 C.F.R. § 305.99(e). If the Secretary determines that implementation of the corrective action plan will achieve substantial compliance, and monitoring of the plan establishes that it is being fully implemented and the state is progressing towards substantial compliance, the loss of IV-A (AFDC) funds will be suspended for a

period not to exceed one year. 42 U.S.C. §§ 603 (h)(2)(A)(ii) & (iii) & 603(h)(2)(B).

Any penalty imposed remains in effect until the Secretary issues a finding of substantial compliance. During this time, the Secretary monitors not only implementation of the corrective action plan, but also monitors and audits all other aspects of the states' IV-D program for each year that the penalty remains in effect. 42 U.S.C. § 652(a)(4). The monetary sanction is suspended until the Secretary finds that either: (1) the state is not implementing its corrective action plan; or (2) despite implementation of the plan, the state did not achieve substantial compliance, based upon a follow-up audit. 45 C.F.R. § 305.99. The Secretary's finding of continued noncompliance after a follow-up audit results in imposition of the monetary sanctions against the state, subject to an

administrative appeal to the Departmental Grant Appeals Board, and subsequent judicial review. 42 U.S.C. § 1316. Each audit takes an average of 21 months to complete. 54 Fed. Reg. 4841 (1989). This lengthy time frame establishes the comprehensiveness of the Secretary's audit process.

B. Factual Background

Respondent Velda Howe is an enrolled member of the Crow Creek Sioux Indian Tribe. The Crow Creek Indian Reservation is one of the nine Indian reservations located within South Dakota. Respondent Theresa Taken Alive is an enrolled member of the Standing Rock Sioux Indian Tribe, another Indian reservation located within South Dakota. Louis Sullivan is the former Secretary of the Department of Health and Human Services. Petitioner James Ellenbecker is the Secretary of the South Dakota Department of Social Services, and

Petitioner Terry Walter is the Program Administrator for the South Dakota Office of Child Support Enforcement (OCSE), a sub-agency of the Department of Social Services. In their official capacities, Ellenbecker and Walter are primarily responsible for administering South Dakota's Child Support Enforcement and Paternity Establishment Program in accordance with the requirements of Title IV-D of the Social Security Act.

The Federal Secretary, in conjunction with the Department of Health and Human Services, have promulgated and developed very specific policies and procedures to assist states in their handling of child support enforcement cases involving Native American Indians. In all cases wherein the Native American absent parent lives, works, or has assets/income off the reservation, and the state can properly exercise jurisdiction over

the same, each state is required to provide the full range of child support enforcement services as mandated by Title IV-D. States are not required to pursue child support enforcement activities involving Native American Indians residing within reservation boundaries, however, if no means exist for the state to obtain jurisdiction over the Indian absent parent, his income, or his assets.

The Federal Defendant also encourages states to enter into cooperative agreements with appropriate tribal officials wherein the respective tribal entity would consent to, and allow, a state to pursue Indian absent parents residing within reservation boundaries for purposes of child support enforcement services. Any cooperative agreements negotiated with an Indian tribe, and any support enforcement services provided

thereunder, must meet all Title IV-D requirements.

The Federal Secretary has developed these policies because of an express recognition that Indian tribes are semi-sovereign entities, and states do not possess either civil or criminal jurisdiction over Indian parents residing within reservation boundaries. These policies, as with all Title IV-D requirements, are binding upon participating states in operation of their Title IV-D child support enforcement program. See, 42 U.S.C. § 652(a)(1); 42 U.S.C. § 654(14).

The State of South Dakota does not have cooperative agreements with any of its nine Indian tribes which would allow state officials to pursue Native American Indians residing within reservation boundaries for child support enforcement activities. No

Indian tribe located within South Dakota has expressed any willingness or desire to enter into any such cooperative agreement with the state; no Indian tribe has consented to the State of South Dakota's pursuit of thousands of Indian absent parents residing within reservation boundaries for purposes of child support enforcement; and, no Indian tribe located within South Dakota has established, or expressed any willingness to establish, the necessary laws and procedures as required by Title IV-D of the Social Security Act.

Despite these jurisdictional barriers and obstacles, South Dakota, through the Office of Child Support Enforcement (OCSE), provides valuable and necessary child support enforcement services to literally thousands upon thousands of Indian parents, and their children, each and every year. It is only when the State of South Dakota cannot obtain

jurisdiction over the Indian absent parent, his income, or his assets, that support enforcement services cannot be provided under Title IV-D. Even in these instances, however, the South Dakota Office of Child Support Enforcement attempts to pursue Indian parents for child support collection and paternity establishment, until such time that the matter is either dismissed or cannot be pursued further because jurisdictional barriers and obstacles.

In its most recent triennial audit conducted in 1989, the Federal Secretary, in conjunction with the Federal Office of Child Support Enforcement, determined that South Dakota was in total and complete compliance with all federal requirements and federal policies in the state's handling of child support enforcement cases involving Native American Indians. South Dakota has never been

sanctioned or cited by the Federal Secretary for not providing appropriate Title IV-D support enforcement services to its Native American Indian residents. South Dakota also has in effect the federally required Title IV-D state plan, which state plan has received continuous approval from the Federal Secretary.

In March of 1987, Theresa Taken Alive applied to the South Dakota Department of Social Services seeking child support enforcement assistance. Specifically, Taken Alive requested that OCSE enforce her tribal court divorce decree. This tribal decree required her former husband to pay $300 per month for the support of the parties' minor daughter, Caroline. The absent parent from whom which she sought child support, however, was a Native American Indian residing within reservation boundaries.

In June of 1989, Velda Howe applied to the Department of Social Services requesting child support enforcement assistance. Specifically, Howe requested that OCSE establish paternity on behalf of her minor son, Daniel Howe. The putative father named by Howe was also a Native American Indian who resided within the boundaries of the Rosebud Sioux Indian Reservation. Because the absent parents in both of these cases were Native American Indians residing within reservation boundaries, OCSE advised both Howe and Appellee Taken Alive that it could not provide the requested services since OCSE could not obtain requisite jurisdiction over either of the Indian absent parents for purposes of child support enforcement.

Howe and Taken Alive then commenced this action in federal district court alleging that both the Federal Secretary, in conjunction

with State Defendants Ellenbecker and Walter, were violating the statutory provisions of Title IV-D by not providing the requested child support enforcement services. Howe and Taken Alive further alleged that they were being denied Title IV-D support enforcement services on the basis of their race, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. The district court subsequently certified the matter as a class action lawsuit.

Petitioners Ellenbecker and Walter repeatedly requested the district court below to dismiss this case. In support of their numerous dismissal motions, Petitioners asserted that Title IV-D did not confer standing upon Howe and Taken Alive, and did not create private enforceable rights entitled

to § 1983 protection. The district court denied all dismissal motions.

Following trial on the merits, the district court entered its decision and order wherein it determined that the Federal Secretary and Petitioners Ellenbecker and Walter were in violation of Title IV-D by not providing child support enforcement services to Native American Indians residing within reservation boundaries. Howe v. Ellenbecker, 774 F.Supp. 1224, 1233-34 (D.S.D. 1991) (A-26 through A-75). The district court entered this decision even though none of the nine Indian tribes had consented to such enforcement activity by state officials within reservation boundaries, and even though none of the respective tribal laws conformed to the mandatory Title IV-D requirements.

On August 10, 1992, the district court entered a subsequent memorandum order

directing Petitioners Ellenbecker and Walter, with the assistance of the Federal Secretary, to use "reasonable efforts" in an attempt to negotiate cooperative agreements with each of the nine Indian tribes located within the state. (A-87 through A-105). Regarding the State Defendants' renewed argument that the case must be dismissed because Title IV-D does not create either standing or private enforceable rights, the district court merely stated that this is "a matter for the parties and the appellate court to consider on appeal." (A-103 through A-105). Ellenbecker and Walter then timely appealed to the Eighth Circuit Court of Appeals seeking to overturn the district court's determination that Title IV-D creates private enforceable rights thereby allowing Howe and Taken Alive to commence and maintain their § 1983 claims. On October 13, 1993, the Eighth Circuit Court of

Appeals issued its decision and judgment affirming the district court below. Howe v. Ellenbecker, No. 92-3354 (8th Cir. Oct. 13, 1993) (A-1 through A-25).

REASONS FOR GRANTING THE WRIT

1. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION IN WEHUNT V. LEDBETTER, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990).

In its decision below, the Eighth Circuit Court of Appeals determined that Title IV-D of the Social Security Act creates private enforceable rights thereby allowing individual litigants to commence and maintain § 1983[1]

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[1] 42 U.S.C. § 1983 provides in pertinent part: "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

lawsuits against state and federal officials for alleged violations of the Act's numerous statutory and regulatory provisions. In reaching its decision, the Eighth Circuit concluded (1) that Congress enacted Title IV-D to order to benefit individuals such as the plaintiffs herein; (2) that Title IV-D gives "unambiguous notice" to participating states of what is expected of it; and, (3) that Title IV-D's internal, comprehensive remedial scheme is not sufficient to foreclose private enforcement of the Act's numerous statutory and regulatory provisions. Howe v. Ellenbecker, supra at 6-10. The Eight Circuit's decision in this matter directly conflicts with the Eleventh Circuit Court of

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or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appeals' decision in Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990).[2] The Eighth Circuit's decision also directly conflicts with the majority of decisions rendered by federal district courts which have examined this precise issue.

In Wehunt v. Ledbetter, 875 F.2d at 1558, a custodial mother and AFDC recipient commenced a class action lawsuit against the State of Georgia and the Federal Secretary for

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[2] As indicated above, the Eleventh Circuit Court of Appeals in Wehunt v. Ledbetter, 875 F.2d at 1558, determined that Title IV-D did not create private enforceable rights. This Court subsequently denied certiorari in that case. Since the Eighth Circuit has now reached a completely opposite conclusion regarding this precise issue, this Court should now grant certiorari to ultimately resolve this conflict, not only for the benefit of the 54 states and territories participating in Title IV-D, but also for the benefit of the millions of Title IV-D child support recipients nationwide.

alleged violations of Title IV-D. The plaintiffs in Wehunt, as in this case, sought federal court intervention to require state and federal officials to properly administer and enforce the statutory and regulatory provisions of Title IV-D. The district court dismissed the action finding that Congress had foreclosed private enforcement of Title IV-D, and further finding that Title IV-D created no implied right of action in favor of private litigants. Wehunt v. Ledbetter, 875 F.2d at 1562-63.

The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the § 1983 claim. In doing so, the Eleventh Circuit carefully examined the comprehensive, self-regulatory scheme of Title IV-D, along with the congressional and legislative history surrounding the Act, and reasoned as follows:

> We find that Title IV-D was not enacted to confer a private cause of action on the appellant or any other person similarly situated. Where a federal statute provides its own comprehensive enforcement scheme, as here, the requirements of that enforcement procedure may not be by passed by bringing suit directly. A ruling to the contrary would open the doors for multitudinous suits to be decided by federal courts. It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress. Wehunt v. Ledbetter, 875 F.2d at 1568-69.

The Eleventh Circuit also correctly recognized that:

> Carried to its logical end, [appellants'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the power of the purse; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action. A federal court is not the proper forum to press general

> complaints about the way in which the government goes about its business. Wehunt v. Ledbetter, 875 F.2d at 1568 quoting Allen v. Wright, 468 U.S. 737, 750 (1984).

Similarly, in Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991), the Sixth Circuit Court of Appeals ordered dismissal of a § 1983 lawsuit seeking private enforcement of Title IV-D's numerous statutory and regulatory provisions. Although the Sixth Circuit Court of Appeals did not totally foreclose the possibility of such lawsuits in all situations, the Sixth Circuit did determine that dismissal was required because of the comprehensive remedial scheme found within Title IV-D itself.

> We conclude that the nature of the relief sought by plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress, given the comprehensiveness of the remedial scheme provided in the statute.

Carelli v. Howser, 923 F.2d at 1214.[3]

The majority of federal district courts which have also considered this issue have determined that Title IV-D does not create private enforceable rights. In Mason v. Bradley, 789 F. Supp. 273 (N.D. Ill. 1992), an AFDC recipient commenced a § 1983 action against the State of Illinois for its alleged failure to comply with the child support enforcement requirements of Title IV-D. Relying upon this Court's decision in Suter v.

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[3] Both the Eleventh Circuit Court of Appeals in Wehunt v. Ledbetter, supra, and the Sixth Circuit Court of Appeals in Carelli v. Howser, supra, explicitly recognized that the comprehensive remedial scheme found within Title IV-D foreclosed private enforcement of the Act by way of § 1983 claims. In its decision below, however, the Eighth Circuit Court of Appeals reached a totally opposite conclusion and determined that Title IV-D's comprehensive remedial scheme was not sufficient to preclude § 1983 lawsuits against state and federal officials.

Artist M., 503 U.S. _____, 112 S.Ct. 1360 (1992) [hereinafter cited as Suter], the district court dismissed the action specifically finding that Title IV-D did not create private enforceable rights.[4] In reaching this conclusion, the district court recognized that Title IV-D did not provide participating states "unambiguous notice" of particular, mandatory obligations as required by this Court in Suter, supra. The district court also recognized that Title IV-D does not require total and complete compliance by participating states in every case. Instead, "the regulations specify that only "substantial compliance," defined as 75 percent compliance in federally audited cases,

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[4] This Court's decision in Suter, 112 S.Ct. at 1366, and its importance in considering the merits of this petition, are discussed in detail in section 2 infra.

is required." Mason v. Bradley, 789 Supp. at 277 citing 45 C.F.R. § 305.20. In view of these factors, the district court concluded that Congress did not intend to create either an express or implied right of action under Title IV-D, and also did not intend to create rights entitled to protection under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

Similarly, in Oliphant v. Bradley, 91 C. 3055 (N.D. Ill. Feb. 19, 1992), another federal district court determined that Title IV-D does not create private enforceable rights entitled to protection by way of § 1983 claims. In reaching this conclusion, the district court succinctly stated:

> These regulations demonstrate that Congress has not intended to place any affirmative obligations on states from which enforceable rights can be inferred. First, states are not obligated to participate in the AFDC program at all. Secondly,

> even if a state elects to participate, nothing in Title IV-D places a binding obligation on the states to provide ... child support enforcement services for every AFDC applicant. Had Congress intended to mandate compliance with the time frames set out in the regulations, it would have conditioned receipt of federal funds on total, rather than substantial compliance. Since we find that Congress has not clearly conditioned the receipt of federal funds on states' provision of effective child support enforcement services for all AFDC applicants, Oliphant cannot claim that Title IV-D provides her with a private, enforceable right. Oliphant v. Bradley, supra at 16-17.

The district court also correctly reasoned that:

> [E]ven if we were to assume that the "substantial compliance" standard does not preclude private enforcement actions under § 1983, the statute's express provisions of detailed responsibilities for the Secretary illustrates Congress' intent to foreclose private remedies. A broad statutory remedial scheme, in conjunction with the flexible standard of state compliance, strongly suggests that Congress did not wish state plans to

> be challenged in private suits. Allowing such actions would inundate the courts with complaints from every parent not completely satisfied with the child support services being provided to them. Oliphant v. Bradley, supra at 18-19.[5]

The Eighth Circuit Court of Appeals below incorrectly decided that Title IV-D creates private enforceable rights entitled to due process protection by way of § 1983 claims. This decision directly conflicts with the

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[5] See also, Clifton v. Schafer, 969 F.2d 278 (7th Cir. 1992), wherein the Seventh Circuit Court of Appeals determined that Title IV-A of the Social Security Act does not create private enforceable rights. "If any such rights are created, it is only the right to require participating states to have in effect the federally required state plan." And, for purposes of this petition, it is undisputed that the State of South Dakota has maintained the federally required state plan pursuant to federal statutes and regulations at all material times, which state plan has received continuous and on-going approval from the Federal Secretary.

Eleventh Circuit Court of Appeals' decision in Wehunt v. Ledbetter, supra, and also conflicts with the majority of federal district courts which have considered this precise issue. This Court should grant certiorari in order to resolve this conflict, and also to insure uniform and consistent application of Title IV-D on a nationwide basis.

2. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S PRIOR DECISION IN SUTER V. ARTIST M., 503 U.S. ____, 112 S.Ct. 1360 (1992).

In Suter, 112 S.Ct. at 1360, this Court determined that the "reasonable efforts" language of the Adoption Assistance and Child Welfare Act[6] did not create private enforceable rights entitled to § 1983 due process protection. In reaching this

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[6] See, 42 U.S.C. § 671(a)(15).

conclusion, this Court recognized that Congress enacted the Adoption Assistance Act pursuant to its spending powers. As such, before a private right of action can be found to exist, a state must be in a position to knowingly and voluntarily accept the conditions imposed upon it, and Congress must clearly and "unambiguously" create such a right. Suter, 112 S.Ct. at 1366-67. This Court also recognized that as a condition of eligibility for federal funding, participating states are required to have an approved state plan which meets all congressional and federal requirements. Suter, 112 S.Ct. at 1367-68. Finally, in deciding that the Adoption Assistance Act did not create private enforceable rights entitled to § 1983 protection, this Court recognized that the Adoption Assistance Act already contained a very comprehensive remedial scheme whereby the

federal government could reduce or totally eliminate federal funding to states for substantial failure in their administration of the Act, or their failure to comply with applicable federal regulations, mandates, and directives. Suter, 112 S.Ct. at 1368-69.

Each of the pivotal factors considered by this Court in Suter when it refused to create private enforceable rights under the Adoption Assistance Act are also found within Title IV-D of the Social Security Act. As with the Adoption Assistance Act, Congress enacted Title IV-D pursuant to its spending powers. See, 42 U.S.C. § 652 et. seq. In doing so, Congress did not "clearly and unambiguously" create private enforceable rights entitled to due process protection by way of § 1983 claims. The 75% substantial compliance standard, coupled with Title IV-D's broad statutory remedial scheme, strongly suggest

that Congress did not intend to create private enforceable rights. See, Oliphant v. Bradley, supra at 18-19. Moreover, Title IV-D's broad statutory remedial scheme is even more comprehensive than that considered by this Court in Suter when it refused to find or create private enforceable rights within the Adoption Assistance Act.[7]

Within its opinion below, the Eighth Circuit correctly recognized that following this Court's decision in Suter, a federal statute must give "unambiguous notice" to a state of what is expected of it before a § 1983 claim is appropriate." Howe v.

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[7] See, Statutory Background, supra. See also, 45 C.F.R. § 301 et. seq. [state plan requirements]; 45 C.F.R. § 305.10 et seq. [federal audits]; 45 C.F.R. § 305.20 et seq. [audit criteria]; 45 C.F.R. § 301.13, § 305.100 [penalty provisions]; 45 C.F.R. § 305.99 [corrective action plans].

Ellenbecker, supra. at 9-10. The appellate court totally ignored the 75% compliance standard found within Title IV-D, however, when it created private enforceable rights under the Act.[8] The Eighth Circuit also failed to properly consider that the State of South Dakota is in total and complete compliance with all federal requirements, directives, and regulations in its handling of child support enforcement cases involving

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[8] As indicated previously, Title IV-D establishes a 75% compliance standard for participating states. See, 45 C.F.R. § 305.20. If the Act also creates private enforceable rights as determined by the Eighth Circuit below, every state will be required to meet all Title IV-D requirements in 75% of its IV-D caseload from a federal regulatory standpoint, but will then face § 1983 lawsuits in the remaining 25% of its caseload for non-compliance with Title IV-D requirements. Such a result clearly was not intended by Congress, and surely does not provide "unambiguous notice" to a state of what is expected of it for federal funding eligibility as required by this Court in Suter.

Native American Indians. If in fact the State of South Dakota, or any other participating state, had known that it could be subjected to countless § 1983 lawsuits for alleged violations of Title IV-D, even though it was meeting all statutory requirements and federal directives, it may well have opted out of Title IV-D participation entirely. See e.g., Suter, 112 S.Ct. at 1366, quoting Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) [A state cannot knowingly and voluntarily accept federal funds if it is unaware of the conditions imposed upon it or if it is unable to ascertain what is expected of it.] Moreover, the Eighth Circuit failed to properly consider the significance of the comprehensive remedial scheme contained within Title IV-D, which remedial scheme "leaves no room for additional private remedies under § 1983." See e.g., Middlesex County Sewerage

Authority v. National Sea Clammers Association, 453 U.S. 1 (1981); Smith v. Robinson, 468 U.S. 992 (1984).

This Court recently determined in Suter that Congress did not intend to create private enforceable rights under the Adoption Assistance Act. A similar conclusion regarding Title IV-D of the Social Security Act is required, despite the Eighth Circuit's ruling to the contrary.[9]

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[9] As shown by the conflicting decisions cited within this petition, this Court's decision in Suter has created considerable confusion and dissension amongst federal courts nationwide. Some courts interpret Suter as a decision which "weakens earlier precedent in vital respects." See e.g., Stowell v. Ives, 976 F.2d 65, 68 (1st Cir. 1992); Howe v. Ellenbecker, supra. at 7 n. 6. Other courts interpret Suter as completely overruling this Court's prior analytical framework and precedent. See e.g., Suter, 112 S.Ct. at 1377 (Blackmun, J., dissenting) [the Court's decision in Suter contravenes 22 years of precedent and changes the rules of the game with no justification]. Since every federal statute "must be interpreted by its own

3. THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION INVOLVING THE INTERPRETATION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

Whether Title IV-D of the Social Security Act creates private enforceable rights is clearly a federal issue which has nationwide significance and importance. As previously stated, 54 states and territories currently participate in the Child Support and Paternity Establishment Program under Title IV-D. The State of South Dakota alone currently handles in excess of 25,000 open, active child support enforcement cases. These include paternity establishment cases; cases to establish a child support obligation; and, cases to enforce a child support obligation. The

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terms", Suter, 112 S.Ct. at 1367 n. 8, this Court should grant certiorari not only to resolve this pivotal issue as it relates to Title IV-D, but also to provide further guidance and clarification to assist lower courts in interpreting other federal statutes.

nationwide IV-D caseload amongst participating states and territories was 12,796,388 active cases at the conclusion of fiscal year 1990, and this number is steadily and rapidly increasing. Fifteenth Annual Report to Congress, OCSE, U.S. Department of Health Human Services - FFY 1990.

If in fact Congress intended to create private enforceable rights under Title IV-D as determined by the Eighth Circuit Court of Appeals below, every participating state and territory will face virtually thousands upon thousands of § 1983 civil rights lawsuits for alleged violations of the Act. This will be true even though the participating states and territories are in total compliance with all federal regulations, requirements, and directives. It cannot be overly emphasized that:

> Allowing such actions would inundate the courts with complaints from every parent not completely satisfied with the child support services being provided to them. Oliphant v. Bradley, supra at 19.

Moreover,

> A ruling to the contrary would open the door for multitudinous suits to be decided by federal court adjudication. Wehunt v. Ledbetter, 875 F. 2d at 1567.

If Title IV-D creates private enforceable rights, the federal judiciary will also be required to supervise state and federal officials in their attempts to provide paternity establishment and child support enforcement services to millions upon millions of needy families within the family law arena, which clearly is an area of law traditionally relegated to the states, and the state court systems. See, Cort v. Ash, 422 U.S. 66, 78 (1975) [one of the primary factors to be

considered in determining the existence of "private rights" under federal statutes is whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states].

The Federal Secretary, in conjunction with the Department of Health and Human Services, has established very stringent policies and procedures which all participating states must follow in providing Title IV-D child support enforcement services. The Federal Secretary has also developed specific policies which participating states must follow in their handling of their Native American IV-D caseload. The Secretary did so because of an express recognition that Indian tribes are semi-sovereign entities, and states do not have jurisdiction over Native American Indians residing within reservation boundaries for purposes of child support enforcement

activities. See e.g., Fischer v. District Court, 424 U.S. 382 (1976) [Indian tribes have inherent authority to regulate domestic relations issues amongst members residing within reservation boundaries]. And, this Court should give substantial deference to an agency's interpretation of a statute which the agency administers, and should not substitute its judgment for a reasonable interpretation of that agency. See e.g., Young v. Community Nutrition Institute, 476 U.S. 974 (1986).

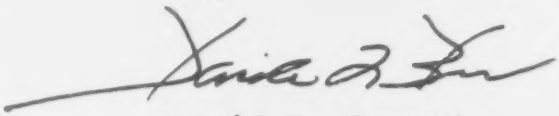
> It is not the function of the judiciary to direct the Secretary in the fulfillment of his role as overseer of the IV-D program. Such could not have been the intent of Congress. Wehunt v. Ledbetter, 875 F.2d at 1568-69.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL



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